No. 96-1852

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY A. BASILE,

Petitioner,

against

TOWN OF SOUTHAMPTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1.

Whether the petition for certiorari should be denied where the Court of Appeals decision rests on independent and adequate state grounds - namely that the value of land taken in condemnation shall reflect the applicable wetland restrictions where claimant's property interest was encumbered by covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel?

2.

Whether the petition for certiorari should be denied where the Court of Appeals decision poses no conflict regarding a substantial federal question of federal law, nor conflicts with the decisions of another state court of last resort, or this Court?

3.

Whether the petition for certiorari should be denied where neither the Court of Appeals decision, nor the record below raises the alleged questions presented in the petition?

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BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioner Dorothy A. Basile incorrectly invokes the jurisdiction of this Court under 28 U.S.C. §1257(a). As more fully explained below, the decision of the New York Court of Appeals is based solely on a ruling that the valuation of petitioner's property in a condemnation proceeding shall be based upon its use as restricted by applicable land use regulations. Petitioner had no property right recognized by state law to develop her property since her title was encumbered by a covenant entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel. Petitioner's claims under the Fourteenth

Amendment of the United States Constitution are new and were never reviewed by the New York courts.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Contrary to Petitioner's assertions, the relevant constitutional provisions involved in the New York Courts are Article 1, Section 7 of the New York State Constitution and the Just Compensation Clause of the Fifth Amendment of the United States Constitution. No one statute was directly involved in this case. Rather, several statutes and a covenant affecting the property were identified below, but petitioner did not challenge the constitutionality of any of them. Petitioner for the first time submits copies of Article 25 of the New York State Environmental Conservation Law and portions of the Southampton Town Code. Although relevant, the constitutionality of these statutes was not challenged below. Several other applicable Federal, State, County and Town statutes and regulations are just as relevant, but were not challenged below. These statutes and regulations are identified herein and in the record.

COUNTER-STATEMENT OF CASE

Certiorari should be denied pursuant to Rule 10 of this Court. The petitioner's claims do not involve an "important question of federal law", nor do the decisions relied on below conflict with any decisions of another state court of last resort, any decisions of the United States Court of Appeals, or any decisions of this Court. Furthermore, the alleged questions presented in the petition were neither raised in the record or

decisions below. Question one is inappropriate as it omits key facts regarding the origin of the alleged property interests taken and there has been no finding by the State court that the applicable restrictions have destroyed all value of the property. Question two is inappropriate because petitioner throughout the proceedings below did not challenge the constitutionality of certain restrictions affecting her property and was never denied the right to do so. Question three is a purely factual inquiry never raised by petitioner below.

In essence, petitioner attempts to "bootstrap" her factual assertions of value in a condemnation claim with the three other unrelated cases[1] which involve challenges to specific statutes as "regulatory takings." This case, however, originates from the Town of Southampton's *de jure* taking of petitioner's property pursuant to formal condemnation proceedings under New York State's Eminent Domain Procedure Law. Petitioner's claim at trial was that pursuant to New York State law, property taken in condemnation should be valued as restricted by the applicable wetland regulations with an increment for the reasonable probability of a successful judicial challenge to the regulations' application as confiscatory. Petitioner, without even identifying or challenging the applicable restrictions, asked the New York Court to assume that any and all restrictions would be found unconstitutional, to wit: the restrictions deny her of all economically beneficial or productive use of the land.

1

Gazza v. NYSDEC, 2 No. 10, 1997 WL 68590 (N.Y. Feb. 18, 1997); *Anello v. ZBA of Village of Dobbs Ferry*, 89 N.Y.2d 535, 184 N.Y.S.2d 656 (1997); *Kim v. City of New York*, 2 No. 8, 1997 WL 58593 (N.Y. Feb. 18, 1997).

Petitioner's value of $960,000 is based upon the potential to develop not just one dwelling, but to create a nine lot subdivision.

The Town, on the other hand, demonstrated, and three New York courts have held that, as a matter of state property law, Petitioner never had a right to unfettered development of the property and that there was no reasonable probability of a successful judicial challenge to the restrictions. The Petitioner conceded and the Town proved that there was no probability that one dwelling, let alone a nine lot subdivision, would be approved for the property due to a certain declaration of covenants and the concomitant land use regulations in place when the subdivision creating the parcel was approved. The New York courts did not establish a rule in this case that a landowner loses a right to challenge a regulation upon the transfer of property to another.

Contrary to Rule 10 of this Court, Petitioner now asks this Court to review the findings of fact and determinations of state property law made by the New York State courts.

STATEMENT OF FACTS

On March 8, 1990, Respondent, Town of Southampton ("Town"), acquired from Petitioner, Dorothy A. Basile ("Basile"), by condemnation, the fee title ownership of a 11.7532 acre wetland parcel located east of Tuthill Lane, north of Moriches Bay, hamlet of Remsenburg, Town of Southampton, County of Suffolk, State of New York.

The Town first appraised the property as of August 1, 1989, in the amount of $128,000.00 and an advance payment

in that amount was made to Basile.[2] (A347) At trial, the Town submitted an updated appraisal valuing the property as of the title vesting date in the amount of $117,500.00. (A416) Basile submitted an appraisal in the amount of $960,000.00. (A288)

Dorothy A. Basile acquired title to the subject premises by virtue of a deed dated March 10, 1989, approximately one year prior to the date of vesting, from Richard B. and Dorothy A. Basile to Dorothy A. Basile alone, for no consideration. (A8a, 15, 358, 416-16) Prior to that transfer, the record shows that title to the property was exchanged several times between members of the same extended family. Each of the transfers were for no consideration. (A8a, 15, 358, 416-16) The Basile family first acquired title to the property by virtue of a deed April 18, 1980 from Tuthill Associates, a partnership, to Richard Basile. (A8a, 15, 358, 416-16) Consideration paid by Richard Basile for this transfer was $88,500.00. (A8a, 15, 358, 416-16)

Petitioner's property was once part of a larger tract owned by Tuthill Associates ("Tuthill"), who sought and were granted approval for a subdivision map by the Planning Board of the Town of Southampton on December 18, 1975. (A432) In that instance, Tuthill sought permission to subdivide the 15.0715 acre tract into 4 parcels - three one-acre building lots and a fourth, a 11.7352 acre tract for future consideration as a building lot. The subject property is shown as Parcel No. 4 on this map. (A424, 432) At the time of the Tuthill subdivision,

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2 The Town has not sought the difference between the advance payment of $128,000 and the award of $117,500 by the Supreme Court. Claimant retains those funds.

the property was constrained by certain state, county and town regulations restricting the development of wetlands. In light of these regulations, the subdivision map was approved with a condition that Tuthill agree to certain covenants. These covenants were recorded in the Suffolk County Clerk's Office at Liber 7974, page 97. (A390) Richard Basile, a real estate investor, was familiar with these covenants and the regulations prior to purchasing the property in 1980. (A7, 19)

The covenant precludes *any development* of the subject property, including the erection of a *single* building or structure, without the prior approval of the Planning Board of the Town of Southampton. (A230, 363, 416-23, 424) Basile's experts ignored the covenant (A165). The covenant states at paragraph 4 *et.seq.* of the first page:

> "WHEREAS, the Planning Board of the Town of Southampton is not willing at this time to approve Parcel No. 4 as described on Schedule A as a building lot because it may consist of wetlands and may not be suitable for erection of a dwelling thereon, and
>
> WHEREAS, the Declarant desires to have Parcels No. 1, 2 and 3 as described on Schedule A approved as building lots at this time, even if said Parcel No. 4 is not suitable for a building lot, and
>
> WHEREAS, the Planning Board of the Town of Southampton is willing to approve said Parcels No. 1, 2 and 3 as building lots, provided that Parcel No. 4 is not approved as a building lot at this time, such that it cannot be built upon without a new application for approval as a building lot

being made to and thereafter approved by the Planning Board of the Town of Southampton" (see also A9)

Furthermore, the covenant states at paragraph number 1 of the second page:

"1. That no building or structure shall be erected on Parcel No. 4 as described on Schedule A, unless and until said Parcel No. 4 is approved as a building lot by the Planning Board of the Town of Southampton." (see also A9)

There is no evidence that Petitioner attempted to ascertain the impact of the covenant or the concomitant regulations. Rather, Petitioner's experts ignored the aforementioned map (A158) and covenant (A165), and generally ignored the Town's land use regulations in establishing the highest and best use of the property. The property is zoned R-40, which permits single family residences on lots consisting of 40,000 sq.ft. and 150 feet of lot width. (A361, 416-43) The property is also located within two special zoning overlay districts, the Tidal Wetland and Ocean Beach Overlay District and the Tidal Floodplain Overlay District (see §§330-39 and 330-42, Town Code). (A416-20) These restrictions limit the type and location of development in and adjacent to tidal wetlands as defined in §330-3 of the Southampton Zoning Code (A112, 400). Approximately ninety-seven (97%) percent of the property is classified as tidal wetlands under this definition. (A263, 400, 415, 421) All of these restrictions existed at the time of subdivision (A263), but none of them were challenged at trial.

Under the best of circumstances, the property would not yield more than one dwelling under the Town Subdivision and Zoning Regulations because of its configuration and because legal access to the public road is limited to only twenty feet in width. (A431) Basile and the Town agreed that it was not reasonable to assume that even a single family dwelling could be built on this property in accordance with Town regulations (A125, 426). Petitioner's surveyor, however, proposes a 9-lot cluster subdivision (A286) based upon a standard yield map. (A284) In preparing these maps, the surveyor basically assumed that the property contained no wetlands. Significantly, the surveyor ignored the yield requirements of §292-10B of the Subdivision Regulations (underwater lands and wetlands areas must be excluded from area contributing to lot yield) (A424, 437) and the required town wetland setbacks and drainage requirements (A437). Also, both maps propose access via a private road to the east, contrary to §280-a of New York State Town Law (which requires suitable access to a public road).

Oddly, petitioner ignored the applicable environmental regulations, but then decided to use the cluster or planned residential development provisions of the regulations (§292-11 and Chapter 247, Southampton Town Code), whose very purpose is to protect the same resources petitioner shuns. (A425) These maps would also create significant drainage issues with respect to the natural flow of water between Moriches Bay and the large wetland area to the north. (A66, 437) Neither map would be approved by the Town. (A426) It was noted that these restrictions existed at the time of the original subdivision (A263), but none were challenged at trial.

Petitioner's experts did not address the impacts of their proposed development on the environment (A92), and failed

to consider the environmental review requirements of the New York State Environmental Quality Review Act (Article 8 E.C.L., 6 NYCRR Part 617, SEQRA) or its local equivalent, Chapter 157 of the Town Code. (A438) These statutes require state agencies to incorporate environmental review in its decision-making and may require an environmental impact statement to be prepared by a developer of wetlands.

Petitioner's experts also failed to address the jurisdictions of the Suffolk County Department of Health Services ("SCDHS") related to water supply and sanitary sewage disposal, the New York State Department of Environmental Conservation ("NYSDEC") under Articles 24 (Freshwater Wetlands) and 25 (Tidal Wetlands) of the New York State Environmental Conservation Law (see 6 NYCRR, Parts 664 & 661, respectively), and the jurisdiction of the United States Army Corp. of Engineers under §404 of the Federal Clean Water Act, [see 33 U.S.C. §§1251-1376 (1982)]. Although the Tidal Wetland Act is mentioned by her appraiser, petitioner introduced no evidence to challenge the constitutionality of this statute as applied to her property, or any of the other regulations.

Petitioner did not challenge the Declaration of Covenants or any Federal, State, County or Town regulations at trial. No claims were made by Petitioner against those governmental entities. Rather, the appraiser assumed that Petitioner was entitled to a subdivision permit, regardless of the covenant and any regulations, because "we have been advised by counsel that, as a matter of law a reasonable probability exists that the legal restrictions could be successfully challenged with regard to the Tidal Wetlands Act, the development would be legally permissible." (A314).

Petitioner introduced no evidence to show that the covenant would be found to be illegal or unconstitutional, or that there was a reasonable probability that even one dwelling, as opposed to a nine lot subdivision, would be approved. Petitioner introduced no evidence to show that she had more than an unilateral expectation or an abstract need to unfettered development of her property, or that a reasonable return on her investment could not be achieved. There is no evidence of market value of the land when it was acquired, other than her husband's purchase price of $88,500.00 in 1980. Petitioner did not and could not introduce any evidence of the market value of the property before the restrictions were imposed without taking into account the impact of the bargained for agreement between the Town and the prior landowner. There is no evidence that the covenant and all of the applicable regulations have destroyed the value of the subject property.

OPINIONS BELOW

A. The Supreme Court's Decision

By Order and Judgment entered in the Clerk of Suffolk County on May 3, 1994 (A2a), and decision dated April 4, 1994 (A6a), Justice Paul J. Baisley of the Supreme Court, Suffolk County, awarded Petitioner, after a non-jury trial, the sum of $117,500.00. Justice Baisley noted that the Court's primary purpose in the proceeding was to determine the just compensation due Petitioner under Article 1, §7 of the New York State Constitution. The Court distinguished the factors present in this case with the state law relied upon by Petitioner in *Chase Manhattan Bank v. State of New York*, 103 A.D.2d 211, 479 N.Y.S.2d 983 (2nd Dept. 1984), *Berwick v. State of New York*, 107 A.D.2d 79, 486 N.Y.S.2d 260 (2nd Dept

1985), and *Berwick v. State of New York*, 159 A.D.2d 544, 552 N.Y.S.2d 409 (2nd Dept. 1990). It found that because the property had been subject to wetland restrictions for a significant period of time, and there was no evidence introduced regarding the value of the property at the time of acquisition, Petitioner's "expert incorrectly assumed that a constitutional challenge to the wetlands designation by the claimant or subsequent transferee would likely be successful." (A6a) Contrary to petitioner's assertions, the Supreme Court did not make a finding that the restrictions destroyed all value of the property.

B. The Appellate Division's Decision

The Appellate Division, Second Department unanimously affirmed the trial court's award based upon the value of the property as restricted by wetlands regulations. Petitioner's counsel argued the unconstitutionally of the State Tidal Wetland Act in his brief and at oral argument, but again failed to identify or address the impact of the covenant and all other concomitant Town regulations.

The Appellate Division in *Basile v. Town of Southampton*, 222 A.D.2d 638, 636 N.Y.S.2d 97, stated that:

> "The claimant's predecessors in interest and the claimant knew, at the time of the purchase/acquisition in 1980 and 1989, that the property was encumbered by wetland restrictions and might not be buildable. Thus, while the claimant conceded and the Town proved that claimant would be denied a permit to build on the property due to wetland restrictions, the Town demonstrated that in light of the declaration and

the wetland mapping, the claimant did not have any reasonable investment-backed expectation of building on her property, the potential of building on the property was not part of her title to begin with, and there was no categorical regulatory taking (see, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003; *Gazza v. New York State Dept. of Envir. Conservation*, _AD2d [2nd Dept. Dec. 4, 1995])." (A444 & 445).

C. The Court of Appeals' Decision

The Court of Appeals affirmed the decision of the Appellate Division, Second Department. In applying existing state property law, the Court found that the facts required that the valuation of petitioner's property should reflect applicable environmental restrictions. Relying on *Matter of Town of Islip v. Mascioli*, 49 N.Y.2d 354, 426 N.Y.S.2d 220, 402 N.E.2d 1123 (1980), which presented a similar issue related to value of property taken in condemnation where a reasonable probability that a court challenge to zoning regulations would entitle landowner to an increment above the restricted value, the court stated:

> "Whatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such claim was not owned by claimant here who took title after the redefinition of the relevant property interests. Moreover, as the concurrence notes, 'the wetlands restrictions at issue in this case did not deprive claimant of any interest in the property

> that had not already been encumbered' by virtue of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel."

The concurring opinion noted that:

> "[e]ven if we were to accept claimant's argument that the property must be valued as if it could be developed for one or more single-family residences because the alternative use for recreational or aesthetic purpose is not an economic use (cf., *Lucas v South Carolina Coastal Council*, 505 US 1003, 1044 [Blackmun, J., dissenting]), that is a consequence of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel."

The Court of Appeals did not decide that Basile did not have a right to challenge the restrictions because she acquired her property after the land use restrictions were enacted. Rather, both the majority and the concurring opinion similarly conclude that under these factual circumstances, Petitioner cannot claim the value of the property without the environmental restrictions, because an unrestricted right to develop the parcel no longer remained in the "bundle" of rights that she acquired through the former owner.

REASONS FOR DENYING THE WRIT

POINT I

THE DECISION OF THE NEW YORK STATE COURT OF APPEALS IS BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS AND THIS COURT SHOULD THEREFORE DENY THEWRIT FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION.

This Court unwaveringly adheres to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. If the state law determination is sufficient to sustain the judgment, "any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, _U.S._, 1997 U.S. Lexis 2801, 10 (1997).

Thus, where a state court decision indicates with the "requisite clarity" that petitioner's claims were rejected on state law grounds, this Court is without authority to address the federal claim supposedly raised below. *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *International Longshoremen's Ass'n.; AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of

this Court's refusal to decide" such cases. *Michigan v. Long, supra*, 463 U.S. at 1040.[3]

Here, the New York Court of Appeals based its decision in determining the value of property in condemnation on the long standing "reasonable probability - incremental increase" rule as set forth in *Matter of Town of Islip v. Mascioli, supra*; see also *Chase Manhattan Bank v. State of New York, supra, Berwick v. State of New York*, 107 A.D. 2d 79, 479 N.Y.S. 2d 983. This rule has evolved in New York with federal underpinnings.

An owner whose property has been taken as a result of condemnation is entitled to just compensation (U.S Const., 5th Amend.; N.Y. Const., Art. I §7, [a]), which generally is calculated by reference to the fair market value of the property at its highest and best use at the time of appropriation, that is, the price a willing buyer would have paid a willing seller for the property (see *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *United States v. 564.54 Acres of Land in Monroe and Pike Counties, Pennsylvannia*, 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979).

That a property is undeveloped at the time of taking does not alter the general rule. Unimproved land must be valued in accordance with the highest and best use for which it is adaptable and available (see *Olson v. United States, supra, Matter of Town of Islip v. Mascioli, supra.*), provided the condemnee establishes as a reasonable probability that such

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3 This Court does, however, assess the sufficiency of the asserted state ground. *International Longshoremen's Ass'n., AFL-CIO v. Davis, supra*, 476 U.S. at 387; *Michigan v. Long, supra*, 463 U.S. at 1038.

use would have been made of the property in the near future and that such use was more than a speculative or hypothetical arrangement (see *United States v. L.E. Cooke Co., Inc.*, 991 F.2d 336 (6th Cir. 1993), *United States v. 15.65 Acres of Land in Marin County*, 689 F.2d 1329 (9th Cir. 1982).

The New York rule, under which petitioner sought to establish the value of her property, states that where the landowner can demonstrate that there is a reasonable probability that a court challenge to zoning or environmental restrictions could succeed, the landowner would be entitled to an increment above the restricted value, which represents the premium a knowledgeable buyer would be willing to pay for potential change to more valuable use (*see Matter of Town of Islip v. Mascioli, supra*; see also *Chase Manhattan Bank v. State of New York, supra.*, *Berwick v. State of New York, supra*).

As the Appellate Division stated in *Berwick v. State of New York*, 486 N.Y.S.2d at 263:

> "[T]he law follows the realities of the market place, which are that a knowledgeable buyer would adjust his purchase price to offset the cost in time and money of applying for a permit and challenging its denial in court as confiscatory. Certainly, a knowledgeable buyer would not pay claimant the full unrestricted residential values of their properties on the day of taking, when wetland restrictions were still legally in effect. He would pay only the value of the property as so restricted, plus some increment representing its enhanced value at such future time when he is successful in nullifying the wetlands restrictions

> in court. . . . [D]ifficulties in securing approval for residential development under local and State tidal wetlands regulations would reduce the desirability of these properties in the market place. That claimants might eventually have secured a judicial declaration of confiscation, compelling the State to compensate them for their loss if a permit was denied, simply cannot be translated into a market value for immediate residential use on the date of taking."

Furthermore, overcompensation is as unjust to the public as undercompensation is to the property owner, and the landowner bears the burden of proving the value of the land, *U.S. v. L.E. Cooke Co., Inc., supra, United States v. 69.1 Acres of Land,* 942 F.2d 290, 292 (4th Cir. 1991).

Thus, petitioner had the burden to show that a reasonable probability existed that the restrictions that would prohibit the development of her property into a nine lot residential subdivision would be found confiscatory. Petitioner failed to meet her burden in a number of ways.

Petitioner did not challenge below the constitutionality of all applicable development restrictions and the declaration of covenants that encumbered the title to her property. Petitioner merely asked the court to assume that there would be a reasonable probability that the State Tidal Wetlands Act would be found unconstitutional and that she would be able to value her property as a nine lot subdivision. Generally, the Constitution leaves the law of real property to the states, *Stevens v. City of Cannon Beach,* 510 U.S. 1207, 114 S.Ct.

1332 (1994). Petitioner's right to subdivide her real property is defined by State and Town regulations,[4] not by federal law nor the Constitution.

Petitioner failed to identify all applicable restrictions and introduced no evidence to show that she had a "right" to build a single dwelling or structure on her property under New York law, let alone subdivide into nine building lots. As the Court found, Petitioner was not deprived of any interest in the property that had not already been encumbered by virtue of the covenants entered into by her predecessor in title in exchange for the right to subdivide and develop what was then a larger parcel. Petitioner's attempts to qualify or interpret the meaning of the covenant at this juncture, without any evidence in the record to substantiate same, is inappropriate.

Thus, the Court of Appeals' determination that defined petitioner's bundle of rights to preclude the potential to develop the property into a nine lot subdivision constitutes adequate and independent state grounds for the judgment below and divests the Court of jurisdiction to hear this case.

The takings issue raised indirectly in this case is a federal question, but the federal aspects of that question are not contested and the issues have already been decided under the precedents of this Court. In particular, the New York courts have correctly interpreted and applied this Court's decision in *Lucas, supra.* While Petitioner, under *Lucas*, has a right to an economic return on her property, the amount of the return is

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4 See New York State Town Law §§276, 277, 278 and Southampton Town Code, Chapters 247 and 292.

limited by the character of the land itself, and the extent of petitioner's rights. In *Lucas*, the Court indicated:

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2899.

Petitioner's arguments failed in the New York courts because the "logically antecedent inquiry" into the nature of petitioner's estate revealed a covenant and concomitant land use regulations which precluded the development of her parcel into nine lots.

Thus, the economic benefit of the parcel that petitioner claims was taken from her did not exist, and the valuation granting petitioner $128,000[5] or a $39,500 return on her family's investment over a ten year period, is reasonable.

Moreover, petitioner could not show the extent to which the restrictions interfered with distinct investment-backed

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5 Town paid an advance payment of $128,000 and Petitioner has retained those funds.

expectations. As Justice Kennedy in his concurring opinion in *Lucas* clarifies:

> "The finding of no value must be considered under the Taking Clause by reference to the owner's reasonable, investment-backed expectations * * * The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. * * * Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations." *Lucas*, 112 S.Ct. 2886, 2903.

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), the Court noted that reasonable, investment-backed expectation must be more than a unilateral expectation or an abstract need. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Court rejected as "quite simply untenable" the contention that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretobefore had believed was available for development . . ." 438 U.S. at 130 [98 S.Ct. at 2662].

Since *Lucas* requires that the historically rooted expectancy or the "bundle of rights" one acquires as a property owner must be measured as of the time it is acquired, there can be no taking if the court concludes that a reasonable purchaser would not have expected to have unfettered use of the subject

property. Here, the New York courts held that in light of the covenant that advised that the property contained wetlands and was not suitable for development, and the fact that the property was regulated for several years prior to her acquisition, petitioner could not reasonably expect to be able to subdivide her property and claim unfettered use. Therefore, the New York courts correctly interpreted and applied the takings decisions of this Court. As *Lucas* settled this issue, this case presents no substantial federal questions, and there are no special and important reasons for granting certiorari.

POINT II

THE DECISION OF THE NEW YORK STATE COURT OF APPEALS POSES NO CONFLICT REGARDING A SUBSTANTIAL QUESTION OF FEDERAL LAW, NOR DOES IT CONFLICT WITH THE DECISIONS OF ANOTHER STATE COURT OF LAST RESORT, A UNITED STATES COURT OF APPEALS, OR THIS COURT

Rule 10 of this Court's rules states that review of a writ of certiorari is a matter of judicial discretion that will be exercised "only for compelling reasons." Although that rule also advises that a writ may be granted if, *inter alia*, a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort, of a United States Court of Appeals, or of this Court, there is no such conflict here.

As an initial matter, the Court of Appeals' opinion rests solely on an interpretation of state property law, and it therefore does not invoke, much less decide, an important

federal question. In fact, where, as here, the issue involves state-created property rights, "it is appropriate to recognize that in certain instances, different states may define these rights by providing additional protection from government interference." *Stupak-Thrall v. United States*, 89 F.3d 1269, 1270 (6th Cir. 1996) (Nelson Moore, J., concurring), *cert. denied*, _U.S._, 136 L.Ed.2d 711 (1997). Regardless of the Court of Appeals ruling in this case, other states are free to provide that one of the sticks in the bundle of rights that comprise fee simple title to land in that state is the right to subdivide and develop property.

The Court of Appeals' decision poses no conflict that merits this Court's review. In fact, the Court of Appeals' ruling, premised upon the factual assertions regarding the value of property encumbered by a covenant with concomitant land use regulations which preclude all reasonable probability of the development of the property, is in perfect harmony with decisions from other state courts of last resort and the federal appellate courts. *See, e.g., Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (S.C. 1995) (landowner never had the right to fill critical area tidelands on his property because statute in existence when he purchased property in 1987 forbade it without a permit); *Hynziker v. State of Iowa*, 519 N.W.2d 367 (Iowa 1994) (denial of building permit did not constitute unconstitutional taking because plaintiffs took title to their property subject to pre-existing state regulations governing the preservation of ancient burial grounds); *Stevens v. City of Cannon Beach*, 317 Ore. 131, 854 P.2d 449 (1993), *cert. denied* 510 U.S. 1207 (1994) (when plaintiffs took title to their land, they were on notice that, under the state's custom, they did not possess the right to exclusively use their dry sands area); *Just v. City of Marinette County*, 56 Wisc.2d 7, 201

N.W.2d 761 (1972) (statute protecting wetlands prevents the public nuisance that filling or alteration of them would create, and requires no compensation to the owner); *Sibson v. State of New Hampshire*, 336 A.2d 239 (1976) (denial of a wetland permit is a valid exercise of police power and did not require compensation); *Claridge v. New Hampshire Wetlands Board*, 125 N.H. 745, 485 A.2d 287 (1984) (purchaser of land with notice of restrictions to development of tidal wetlands can justify few, if any, legitimate investment-backed expectations of development right which rise to the level of constitutionally protected property rights); *Ciampitti v. United States*, 22 Cl.Ct. 310 (1991) (denial of permit to fill wetlands did not interfere with reasonable, investment-backed expectations and did not require compensation); *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (U.S. Dist. Ct., M.D., Florida, Orlando Div. 1989) (denial of development permit on oceanfront property did not constitute taking requiring compensation); *Leonard v. Town of Brimfield*, 423 Mass. 152, 666 N.E.2d 1300, *cert. denied*, __U.S.__ 117 S. Ct. 582 (1996) (landowner did not have reasonable, investment-backed expectations to subdivide floodplain property and did not require compensation); *Allegria v. Keeney*, 1997 WL 33587 (R.I. Jan. 29, 1997) (purchaser's prior knowledge of wetland restrictions was relevant in determining that purchaser had no reasonable investment-backed expectations of developing property and did not require compensation).

Petitioners nonetheless assert that the Court of Appeals' opinion conflicts with the "regulatory taking" opinions of four state courts (Pet., at 11-17). Notwithstanding that none of these decisions involve a question of value in condemnation, further review of those cases demonstrates that no conflict exists.

The first and only decision of a state court of last resort cited by petitioners, *Lopes v. City of Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (Mass. 1994), stands for the wholly unremarkable proposition that, under Massachusetts law, a property owner is entitled to challenge a pre-existing land use regulation (Pet., at 13). The only issue before that Court was the plaintiff's facial challenge to the regulation, 417 Mass., at 302; 629 N.E.2d, at 1314. That principle has no applicability in this matter, which raises no facial challenge whatsoever.[6] In a footnote (#13 at 417 Mass. 307) in its decision the Massachusetts court noted:

> "... Lopes thus has the burden of showing that the zoning regulation as applied to his property does not substantially advance legitimate State interests . . . He will also have the burden of proving that the zoning regulation has deprived the land of all economically beneficial use. He will have to prove that the use of the property (presumably a single family residence use) is one that is economically feasible and otherwise permitted under various other regulations, including the State sanitary code. On the issue whether that use would constitute a nuisance or some other unlawful use of the land, principles

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6 Indeed, in language petitioners' unaccountably ignore, the *Lopes* Court explicitly acknowledged that "the rights of a subsequent purchaser to takings damages might well stand in a posture significantly different from that of one seeking to have a zoning provision invalidated." 417 Mass., at 303, n.8; 629 N.E.2d, at 1317.

> guiding the placing of the burden of proof may shift that burden to the city or perhaps place on it the burden of going forward to present evidence tending to show that Lope's proposed use would improperly exceed other limits on his right to use his land. At least, in this case, the government must identify background principles of nuisance or property law that prohibit the landowner's proposed use of the property." (citing *Lucas*)

In fact, Massachusetts now recognizes that where a purchaser acquired property in a designated flood plain that was subject to established restrictions on building, she has a right to challenge the continued application of a restriction, but she "may not complain about the loss of a right she never acquired." *Leonard v. Town of Brimfield*, 423 Mass. 152, 666 N.E.2d 1300, 1303 (Mass. 1996), *cert. denied*, _U.S._ 117 S. Ct. 582 (1996). The *Lopes* decision therefore cannot pose any conflict worthy of this Court's review.

Petitioner also erroneously contends that a conflict arises with *K & K Construction, Inc. v. Department of Natural Resources*, 217 Mich.App. 56, 551 N.W.2d 413 (Mich. App. 1996) (Pet., at 14-15), which is not even a decision of state court of last resort. This is an intermediate state appeals court decision. That Court, however, agrees that a regulation must inhere to the owner's title and must be grounded in background principles of nuisance and property law. 217 Mich. App., at 62; 551 N.W.2d, at 417. In that particular case, the Court held that the constitutional provision and legislative preamble relied on by the State to establish those background principles were insufficient to carry the State's burden in this regard. 217 Mich.App., at 62-63; 551 N.W.2d, at 417-18. The Court also

upheld the lower court's discretion as the trier of fact to determine the fair market value of the land with the use restrictions placed on it.

Petitioner also relies on *Moroney v. Mayor*, 268 N.J. Super. 458, 633 A.2d 1045 (N.Y. Super. Ct. App. Div., N.J. 1993) (Pet., at 15-16), another intermediate appellate decision. *Moroney* is not helpful here as it turns on the specific language of the zoning provisions in issue, which expressly states that if a property owner had the right to apply for a hardship variance when the zoning ordinance was enacted, the right passes to a successor in title. 268 N.J. Super., at 464; 633 A.2d, at 1048. Thus, the *Moroney* Court also examined the property owner's bundle of rights in light of existing state law.

The last case petitioner relies on, *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, (Fla. Dist. Ct. App. 5th Dist. 1992), *review denied*, 613 So. 2d 3 (Fla. 1992), is also not a decision of state court of last resort. The *Vatalaro* Court never held as a general rule that the denial of a building permit to one who purchases after restrictive regulations have been adopted is a taking requiring compensation. Rather, the *Vatalaro* court agreed that the wetlands regulations at issue would bar a takings claim where there was a denial of a rezoning or variance application, because the property was purchased in anticipation of a discretionary rezoning application which, if denied, did not affect the landowner's bundle of rights. 601 So. 2d at 1229. However, the Court then distinguished cases involving permit regulations, where the land is purchased "with future development legitimately anticipated and with no existing bar thereto." *Id.* Thus, both the *Vatalaro* court and the New York Court of Appeals

approach the issue similarly by examining the bundle of rights a landowner acquired in light of relevant state law.

The Court of Appeals decision does not conflict with a footnote in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) as petitioner asserts (Pet., at 21). In *Nollan*, this Court held that the state agency could not implement a policy that exacts a public beachfront easement in exchange for a building permit without a showing of a sufficient nexus to a legitimate governmental purpose, even if the landowners knew of that policy when they acquired the property. Here, there is no development exaction at issue.

Lastly, the New York Supreme Court's recent decision in the matter of *Brotherton v. NYSDEC*, Case No. 12809-90 Sup.Ct., Suffolk Cty., IAS 8, 2/24/97 is of no consequence. This case is decided on a similar inquiry into the bundle of rights a landowner acquired in light of relevant state law. In reviewing a denial of a tidal wetland permit by the State, the Court found no regulatory taking had occurred because of the unity in use and ownership with respect to the two parcels in question and found significant value left in the property.

Thus, petitioner has failed to raise a conflict involving a substantial federal question that merits this Court's review, and her writ should be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: Southampton, N.Y.
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Respectfully submitted,

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